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No. 01-298

DEC 20 2001

In the Supreme Court of the United States

PAUL D. LAPIDES, PETITIONER

v.

BOARD OF REGENTS OF UNIVERSITY OF GEORGIA SYSTEM, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a State that voluntarily removes a case to federal court waives its Eleventh Amendment forum immunity when state law does not expressly authorize the removing official to consent to suit.

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INTEREST OF THE UNITED STATES

The question presented in this case is whether a State that voluntarily removes a case to federal court waives its Eleventh Amendment forum immunity when state law does not expressly authorize the removing official to consent to suit. The United States has a substantial interest in the resolution of that question. Federal law conditions a State's access to certain federal programs and benefits on the State's waiver of its immunity from suit in federal court. *E.g.* 42 U.S.C. 2000d-7 (States that receive federal financial assistance waive immunity from suit to enforce nondiscrimination requirements); 11 U.S.C. 106(b) (States that file proof of claim in bankruptcy waive immunity from suit with

respect to claims arising from the same transaction or occurrence); 47 U.S.C. 252(e)(6) (Supp. V 1999) (States that elect to assume regulatory authority under the Telecommunications Act of 1996 waive immunity from suit to review state commission actions). In addition, the United States possesses a distinct immunity from suit, except insofar as Congress expressly waives that immunity. See, *e.g.*, *Lane* v. *Pena*, 518 U.S. 187, 192 (1996). The United States therefore has a substantial interest in the standards for determining whether a State has waived its immunity from suit.

STATEMENT

1. Petitioner is a professor at Kennesaw State University (KSU), a state institution governed by the Board of Regents of the University of Georgia. Pet. App. 2a. In 1997, a KSU student charged petitioner with sexual harassment. *Ibid.* Although the charges were not proven, KSU officials allegedly placed information relating to the charges in petitioner's personnel file, which adversely affected his chances of obtaining other university positions. *Ibid.* Petitioner filed suit in the Superior Court of Cobb County Georgia against the Board of Regents and the responsible KSU officials (respondents), alleging that respondents' actions deprived him of due process of law in violation of the Fourteenth Amendment. *Ibid.* Petitioner also claimed that respondents committed the common law torts of libel and slander. *Ibid.* Petitioner sought compensatory and punitive damages under 42 U.S.C. 1983 (Supp. V 1999) and the Georgia Torts Claims Act, Ga. Code Ann. § 50-21-23 (1998). *Ibid.*

Pursuant to 28 U.S.C. 1441, respondents removed the case to the United States District Court for the Northern District of Georgia, and simultaneously moved to

dismiss petitioner's complaint. Pet. App. 2a. Respondents argued that the federal claims against the Board of Regents and the individual respondents in their official capacities are barred by the Eleventh Amendment and unauthorized by 42 U.S.C. 1983 (Supp. V 1999). Pet. App. 17a. Respondents also argued that the tort claims are barred by the Eleventh Amendment because the Georgia Tort Claims Act authorizes such suits against the State only in state court. *Ibid.* Respondents also asserted that the claims against the individual respondents in their individual capacities are barred by qualified immunity, and that petitioner's complaint fails to state a claim for relief under the Due Process Clause. *Id.* at 17a-18a.

The district court granted in part and denied in part respondents' motion to dismiss. Pet. App. 12a-28a. The court rejected respondents' Eleventh Amendment arguments, holding that the State had waived its immunity from suit in federal court when it voluntarily removed the case to that forum. *Id.* at 19a-24a. The court reasoned that "the Attorney General, as the State's counsel in this case, has the authority to waive the state's Eleventh Amendment immunity by and through his representation of the state irrespective of any express grant of authority to do so." *Id.* at 23a. The court dismissed the claims against the individual respondents in their personal capacities based on qualified immunity. *Id.* at 24a-27a. The court refused to dismiss the claims against the Board of Regents and the individual respondents in their official capacities for failure to state a claim, holding that petitioner might be able to establish that the State had an unconstitutional policy or custom. *Id.* at 27a-28a. The court did not address respondents' argument that Section 1983 does not authorize a suit for damages against the State.

2. On the State's interlocutory appeal, the court of appeals reversed the district court's Eleventh Amendment rulings. Pet. App. 1a-11a. Relying on *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945), the court of appeals held that, absent explicit authority in the State's "constitution, statutes, and decisions," a State's Attorney General may not waive a State's Eleventh Amendment immunity from suit. Pet. App. 4a. The court noted that Georgia law specifically authorizes its Attorney General to represent the State in all litigation, *id.* at 6a, but the court concluded that, under *Ford*, such a grant of authority is not sufficient to empower a State's Attorney General to waive Eleventh Amendment immunity. *Ibid.* The court of appeals reaffirmed its holding in *In re Burke*, 146 F.3d 1313 (11th Cir. 1998), cert. denied, 527 U.S. 1043 (1999), that, even absent an express statutory waiver, a State's filing of a proof of claim in bankruptcy court waives the State's immunity from a suit seeking attorneys' fees for enforcement of an automatic stay and discharge injunction, but viewed *In re Burke* as "circumscribed by the context of bankruptcy." Pet. App. 7a.

The court of appeals acknowledged being "troubled by the seemingly inconsistent positions of the State by both asserting that the federal courts have jurisdiction to obtain removal, while simultaneously arguing with equal force that the federal courts do not have authority to hear the claims because of Eleventh Amendment immunity." Pet. App. 8a-9a. The court also noted that Justice Kennedy had stated in his concurring opinion in *Wisconsin Dep't of Corr.* v. *Schacht*, 524 U.S. 381 (1998), that *Ford Motor* is not an "insuperable obstacle to adopting a rule of waiver in every case where the State, through its attorneys, consents to removal from state court to the federal court." Pet. App. 9a (quoting

Schacht, 524 U.S. at 397 (Kennedy, J., concurring)). The court of appeals nevertheless concluded that, as suggested by the majority in *Schacht*, in a case such as this a federal court should hear the claims that are not barred by the Eleventh Amendment and remand to the state court the claims that are barred. *Id.* at 9a-10a. The court of appeals therefore instructed the district court "to hear only those non-barred claims over which it has jurisdiction and remand the others to state court." *Id.* at 11a. The court added that "[i]f no such non-barred federal questions exist, the whole case is to be remanded to state court." *Ibid.*

SUMMARY OF ARGUMENT

A State's removal of a case to federal court waives its Eleventh Amendment forum immunity. The court of appeals erred in holding that such a waiver is valid only if the removing official has express state law authority to consent to suit. When the asserted basis for a waiver of immunity is that state law affirmatively waives immunity for a particular type of suit, the relevant inquiry is whether state law expressly authorizes the waiver. But certain voluntary actions of a State waive the State's immunity as a matter of federal law, and in those contexts, an inquiry into whether state law expressly authorizes a state official to consent to suit is unnecessary.

A. In several federal statutes, for example, Congress has conditioned a State's access to federal programs or benefits on a waiver of immunity from suit. In those federal statutory schemes, federal law provides that a State's voluntary participation in the program itself waives immunity from suit. See *e.g.*, *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959). Any state attempt to negate that consequence

through reliance on state law is preempted under the Supremacy Clause.

B. Similarly, in a series of decisions, the Court has held that a State may waive its immunity from suit through invocation of federal court jurisdiction. Those cases include both those in which a State chooses a federal forum for litigating a claim, *Clark* v. *Barnard*, 108 U.S. 436 (1883); *Gardner* v. *New Jersey*, 329 U.S. 565 (1947), and ones in which a State is brought into federal court through coercive process, but then chooses to litigate a claim on the merits rather than assert an immunity defense, *Gunter* v. *Atlantic Coast Line R.R.*, 200 U.S. 273 (1906); *Richardson* v. *Fajardo Sugar Co.*, 241 U.S. 44 (1916). Under those decisions, the act of engaging in litigation conduct itself waives the State's immunity. At most, the Court inquires into whether state law authorizes a state actor to engage in certain litigation conduct; it does not inquire into whether state law authorized a waiver through litigation conduct. Otherwise, a State could litigate a claim on the merits, and if it wins, it would obtain the benefit of res judicata. But if it loses, it could simply assert immunity on appeal, arguing that its attorney lacked express state law authority to consent to suit.

C. The removal statute does not, like the law in *Petty* and other federal statutes, expressly condition a State's exercise of the removal option on its waiver of immunity from suit. Removal, however, is a form of litigation conduct that, like the conduct in *Clark* and *Gardner*, is a volitional action that waives a State's forum immunity. For a case to be removed, every defendant must consent, and once the option is exercised, the case is placed in the jurisdiction of a federal court and removed from the jurisdiction of a state court unless or until the federal court remands the case. A State that consents

to removal therefore voluntarily and unambiguously invokes federal court jurisdiction.

Nor does it matter that the State in this case asserted immunity on some claims at the same time that it invoked federal court jurisdiction on others. Once a State voluntarily invokes a federal forum, it cannot turn around and claim immunity from that forum. Acceptance of the court of appeals' contrary view would give a State unprecedented power to force a plaintiff to litigate a single case or controversy in two different forums. Nonetheless, while a State that removes a case is in the position of a plaintiff on the issue of forum selection, it remains an involuntary defendant on all other issues. Thus, while removal waives a State's Eleventh Amendment forum immunity, a State that removes a case retains all defenses that it would have had if the case had been litigated in state court.

D. The State's waiver of forum immunity is not negated by its Attorney General's absence of express state law authority to consent to suit. The court of appeals erred in relying on this Court's decision in *Ford Motor Co.* v. *Deptartment of Treasury*, to support a contrary conclusion. *Ford* is difficult to reconcile in principle with other cases that treat a State's litigation conduct in federal court as a waiver, and that consider state law, if at all, solely to determine whether the State's attorney had authority to litigate on the State's behalf. Accordingly, in an appropriate case, the Court may wish to reconsider that decision. At the very least, *Ford* can and should be limited to cases, like *Ford*, in which a State is brought into federal court through coercive process, and the State's failure to raise an immunity defense in a timely manner is the only basis for finding a waiver. Here, as in *Clark* and *Gardner*, the State affirmatively sought out the federal forum.

The State's removal therefore waives the State's forum immunity, and the State may not avoid that conclusion by asserting that its Attorney General lacked express state law authority to consent to suit.

ARGUMENT

A STATE THAT REMOVES A CASE WAIVES ITS ELEVENTH AMENDMENT FORUM IMMUNITY WITHOUT REGARD TO WHETHER ITS ATTORNEY GENERAL HAS EXPRESS STATE LAW AUTHORITY TO CONSENT TO SUIT

A State's sovereign immunity from suit in federal court is "a personal privilege which it may waive at pleasure." *Clark* v. *Barnard*, 108 U.S. 436, 447 (1883). The court of appeals in this case held that the State's voluntary decision to remove the present case to federal court did not constitute such a waiver. The court based that holding in large part on its view that "a waiver of Eleventh Amendment immunity by state officials must be explicitly authorized by the state in its Constitution, statutes and decisions." Pet. App. 4a (citations and internal quote marks omitted). Because Georgia law does not expressly authorize the state Attorney General to waive immunity from suit, the court concluded, the Attorney's General's removal of the case to federal court could not effect a valid waiver. *Id.* at 6a.

The court of appeals fundamentally misconceived the relevance of state law to waiver issues. When the asserted basis for a waiver of sovereign immunity is that state law affirmatively waives the immunity for a certain type of suit, the relevant question is the one posed by the court of appeals—does state law expressly authorize the waiver. This Court has insisted on a particular clarity in the face of a suggestion that a state

law waives a State's sovereign immunity not only in its own courts, but in federal court as well. Accordingly, this Court has held that a State does not consent to suit in federal court when state law authorizes a state entity to "sue and be sued," *Florida Dep't of Health & Rehabilitative Servs.* v. *Florida Nursing Home Ass'n*, 450 U.S. 147, 149-150 (1981), or even when it authorizes suit against the State "in any court of competent jurisdiction," *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U.S. 573, 577-579 (1946).

Under this Court's cases, however, a State can waive sovereign immunity not only through positive law, but through its actions. In those cases, the State's voluntary conduct waives the State's immunity as a matter of federal law, and no inquiry into whether state law expressly authorizes a state official to consent to suit is necessary.

A. A State Waives Immunity When it Voluntarily Participates In A Federal Program That Conditions Participation On A Waiver

One instance in which a State's voluntary conduct results in a waiver of immunity as a matter of federal law is when Congress conditions a State's access to a federal program or a federal benefit on a State's waiver of immunity from suit. For example, Congress has authority under the Constitution to condition approval of a federal compact between two States on the States' waiver of immunity from suit. *Petty*, 359 U.S. at 278-282. Congress also has authority to condition a State's receipt of federal funding on such a waiver. *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 246-247 (1985). In such cases, federal law provides that a State's voluntary

participation in a federal program will have certain consequences for a State's immunity from suit. Congress's authority to condition access to a federal program or benefit on a waiver of immunity is not without limits: Congress must make the condition sufficiently clear, *Atascadero*, 473 U.S. at 247, and the waiver of immunity must be related to the purposes of the underlying program. *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987). But those limits are a matter of federal law, and as long as those conditions are met, Congress may secure a waiver of immunity "indirectly" even though it could not impose such a waiver "directly." *Id.* at 210.[1]

Consistent with those principles, several federal statutes condition a State's access to a federal program or benefit on a State's waiver of immunity from suit. For example, as a condition to receiving federal funds, States must comply with certain nondiscrimination requirements that may be enforced by private parties in federal court. *E.g.*, 42 U.S.C. 2000d-7. A State's filing of a proof of claim in a bankruptcy court waives a State's immunity from claims that arise out of the same transaction or occurrence. 11 U.S.C. 106(b). And state

[1] In *College Savings*, the Court held that Congress lacks authority to prevent a State from engaging in commercial activity unless it consents to suit. The Court reasoned that "the point of coercion is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity." 527 U.S. at 687. In that context, waiver and abrogation "are the same side of the same coin." *Id.* 683. At the same time, the Court distinguished conditions on otherwise lawful activity from conditions on participation in a federal program, and reaffirmed that Congress may condition a State's participation in federal programs on a waiver of immunity from suit. *Id.* at 686-687.

commissions that elect to participate in regulating telecommunications may have their decisions reviewed in federal court. 47 U.S.C. 252(e)(6).[2] In each of those federal statutory schemes, federal law provides that a State's voluntary participation in the federal program has the consequence of waiving immunity from suit. There is no requirement that the state entities or officials participating in the program have express state law authority to consent to suit.

This Court's decision in *Petty* establishes the validity of that approach. There, the Court held that two States had consented to suit in federal court by entering into a federal compact that contained a sue and be sued clause and that preserved previously existing federal court jurisdiction. The Court rejected the argument that the compact did not effect a waiver because state law in the respective States did not treat the language in the agreement as a waiver of immunity from suit. The Court acknowledged that "when the alleged basis of waiver of the Eleventh Amendment's immunity is a state statute, the question to be answered is whether the State has intended to waive its immunity." 359 U.S. at 278. It explained, however, that when the waiver is claimed to arise from a compact approved by Congress, the question whether there has been a waiver "is a question of federal law." *Id.* at 279. The Court then held that, because the terms of the compact and the circumstances surrounding it made it "clear" that the

[2] This Court has pending before it the question whether the Telecommunications Act of 1996 effects a valid waiver of the State's immunity from suit. See *Mathias* v. *WorldCom Techs., Inc.*, No. 00-878 (argued Dec. 5, 2001); *Verizon Md. Inc.* v. *Public Serv. Comm'n*, No. 00-1531, and *United States* v. *Public Serv. Comm'n*, No. 00-1711 (order directing briefing Dec. 12, 2001).

States accepting it waived immunity, the States "by accepting it and acting under it assume the conditions that Congress under the Constitution attached." *Id.* at 281-282.

The lesson of *Petty* is clear. When a State through its entities or officials voluntarily elects to participate in a federal program knowing that a consequence of participation is a waiver of immunity from suit, the State's waiver of immunity is just as much an "intentional relinquishment or abandonment of a known right or privilege" (*College Sav.*, 527 U.S. at 682) as a waiver that is expressly embodied in state law.

The Seventh Circuit made precisely that point in *MCI Telecommunications Corp.* v. *Illinois Bell Telephone Co.*, 222 F.3d 323 (2000). In that case, state commissions argued that they had no authority under state law to waive the State's immunity from suit and that their voluntary election to regulate telecommunications therefore could not effect a waiver of the State's immunity. The Seventh Circuit rejected that argument as follows:

> It is the states that have authorized the commissions to regulate the telecommunications industry, * * * and, despite the clear warning from Congress in subsection 252(e)(6) of the 1996 Telecommunications Act, neither Illinois nor Wisconsin have taken any steps to forbid their respective commissions from exercising the authority granted to them by Congress. * * * By accepting the grant of regulatory power offered by Congress, and by allowing the state commissions to exercise that power, Illinois and Wisconsin cannot contend now that they are not bound by the conditions attached to that grant of power.

Id. at 344 n.10.

Basic Supremacy Clause principles reinforce the Seventh Circuit's analysis. Because Congress has authority under the Constitution to condition state access to a federal program or benefit on a waiver of the State's immunity from suit, federal law determines the consequences of the State's voluntary actions, and any state effort to negate that condition through reliance on state law would be preempted by the Supremacy Clause. *Lawrence County* v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 257-258 (1985) (state statute imposing restrictions on the way federal funds are intended to be spent "is invalid under the Supremacy Clause"). A State may not simultaneously accept the benefits of a federal program and fail to comply with the conditions upon which those benefits are extended. *Townsend* v. *Swank*, 404 U.S. 282, 286 (1971) (state rule that conflicts with the conditions on which federal funds are offered is "invalid under the Supremacy Clause").

B. A State Waives Immunity When It Voluntarily Invokes Federal Court Jurisdiction Or Engages in Other Voluntary Litigation Conduct

A State may also waive its immunity from suit by voluntarily invoking federal court jurisdiction or through other voluntary litigation conduct. *College Sav.*, 527 U.S. at 675-676, 681 n.3. Several decisions of this Court illuminate the scope of that principle.

In *Clark* v. *Barnard*, 108 U.S. 436 (1883), a State intervened as a defendant in order to assert a claim to money sought by the plaintiff. The Court held that, by voluntarily entering the case as a party and asserting a claim to the money, the State had waived its immunity from suit. *Id.* at 447-448. The Court explained that the

State had "appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination." The Court added that the State had become "an actor as well as defendant." *Ibid.*

In *Gunter* v. *Atlantic Coast Line R.R.*, 200 U.S. 273 (1906), the Court addressed a railroad's effort to enforce a prior federal court judgment limiting the collection of certain state taxes. In the earlier litigation, the State, through its Attorney General and two county treasurers, raised no objection to federal court jurisdiction and litigated the case on the merits. The district court enjoined the collection of taxes, and this Court affirmed. See *Humphrey* v. *Pegues*, 83 U.S. (16 Wall.) 244 (1872). When the railroad initiated litigation to enforce the decree, the State argued for the first time that the original decree violated the Eleventh Amendment. This Court rejected that contention, explaining that "[a]lthough a state may not be sued without its consent, such immunity is a privilege which may be waived, and hence where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." *Id.* at 284. The Court added that "[n]one of the prohibitions" of the Eleventh Amendment "relate to the power of a Federal court to administer relief in causes where jurisdiction as to a State and its officers has been acquired as a result of the voluntary action of the State in

submitting its rights to judicial determination." *Id.* at 292.[3]

The Court extended *Gunter* in *Richardson* v. *Fajardo Sugar Co.*, 241 U.S. 44 (1916). There, the plaintiff filed suit against the treasurer of Puerto Rico to recover taxes that had been paid under protest. The State answered the complaint and agreed to a trial date, but raised an immunity defense eight months after the complaint was filed. Relying on *Gunter*, the Court held that "[w]hatever might have been the merit of this position if promptly asserted and adhered to, we hold, * * * that having solemnly appeared and taken the other steps above narrated, plaintiff in error could not thereafter deny the court's jurisdiction." *Id.* at 47.

Finally, in *Gardner* v. *New Jersey*, 329 U.S. 565 (1947), a State filed a proof of claim in bankruptcy, but later objected on Eleventh Amendment grounds when the trustee sought an adjudication of that claim. The Court held that the Eleventh Amendment did not bar an adjudication of the State's claim, explaining that "[w]hen the State becomes the actor and files a claim against the fund, it waives any immunity which it otherwise might have had respecting the adjudication of the claim." *Id.* at 574.[4]

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[3] *Gunter*, thus, suggests that a State could not voluntarily litigate a case raising pendent state law claims through to dismissal of the federal claims on the merits and the pendent state law claims under 28 U.S.C. 1367(c), and then raise an Eleventh Amendment objection to the operation of 28 U.S.C.1367(d) in state court in the first instance. See Brief for the United States as Amicus Curiae at 18, *Raygor* v. *Regents of the Univ. of Minn.*, No. 00-1514 (argued Nov. 26, 2001).

[4] State participation in litigation does not invariably waive a State's immunity from suit. When a State declines to become a party, but makes an appearance for the limited purpose of object-

Under *Clark*, *Gunter*, *Richardson*, and *Gardner*, a State's submission to federal court jurisdiction waives immunity without regard to whether state law expressly authorizes the State's attorney or the state party appearing before the court to consent to suit. Federal law, rather than state law, determines the consequences of the State's litigation in federal court. In *Clark* and *Richardson*, the Court did not canvass state law at all before determining that the State's litigation conduct effected a waiver. *Clark*, 108 U.S. at 447-448; *Richardson*, 241 U.S. at 47. In *Gunter* and *Gardner*, the Court considered state law, but only for the limited purpose of determining that the state officials who represented the State in the proceedings had authority *to litigate* on behalf of the state. *Gunter*, 200 U.S. at 286 (noting that state law authorized the Attorney General to defend actions with respect to taxes "for and on behalf of the State"). *Gardner*, 329 U.S. at 574-575 (noting that state law authorized the Comptroller to "institute and direct prosecution * * * for just claims and debts due to the state," and authorized the Attorney General to "attend generally to all matters in which the state is a party or in which its rights and interests are involved"). The Court did not in any of the four cases inquire into whether state law expressly authorized the relevant state officials to *waive* the State's immunity from suit in federal court. Thus, at most, the Court inquires into whether state law authorizes a state actor to engage in certain litiga-

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ing to the court's jurisdiction, it does not waive its immunity from suit. *Clark*, 108 U.S. at 448. Similarly, when a State intervenes as a party for the limited purpose of obtaining an order to preserve the status quo, and does not "seek the determination of any rights or title," it does not waive its immunity from suit. *Missouri* v. *Fiske*, 290 U.S. 18, 24-25 (1933) (internal quote marks omitted).

tion conduct, not whether state law authorized a waiver through such conduct.

Considerations relating to the fair administration of justice support the Court's holdings that invocation of federal court jurisdiction waives Eleventh Amendment immunity, and that it does so without regard to whether state law gives state entities or officials express statutory authorization to consent to suit. If a State could invoke federal court jurisdiction and then disclaim consent to suit later, it would create for the States an opportunity to engage in litigation gamesmanship. A State could litigate a claim on the merits in federal court, and obtain the benefits of res judicata if it were to prevail. On the other hand, if it were to lose, it could simply assert immunity on appeal, arguing that its attorney lacked express authority to consent to suit. See *Wisconsin Dep't of Corr.* v. *Schacht*, 524 U.S. 381, 394 (Kennedy, J., concurring).

The only way for a district court to avoid that result would be for it to raise the immunity issue *sua sponte*, evaluate the state statutes concerning authority to waive, and dismiss the case if it found state law authority lacking. This Court has held, however, that a district court is not required to raise the issue of immunity *sua sponte*. *Schacht*, 524 U.S. at 389. Moreover, it would threaten harmonious federal-state relations for federal district courts routinely to ask the State's representatives in court whether they have authority to waive the State's immunity from suit. The potential for a strain on federal-state relations is particularly acute if the State's attorney represents that he has such authority and desires a decision on the merits, but the federal district court concludes, based on an examination of the relevant state-law authorities, that authority is lacking and dismisses the case. The principle of dual

sovereignty is not well served by a rule that forces federal courts to disregard representations made by counsel for the State and to engage in delicate inquiries into state law separation of powers principles.[5]

Treating invocation of federal court jurisdiction as a waiver of immunity does not unduly impair the State's ability to preserve its immunity from suit. A State that wishes to avoid waivers through litigation conduct may simply direct its attorneys not to invoke the jurisdiction of a federal court.[6]

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[5] The Fourth Circuit has held that when a State's attorney affirmatively waives an Eleventh Amendment defense, a district court lacks authority to dismiss the case on Eleventh Amendment grounds, even when an analysis of state law shows that the State's attorney lacks authority to consent to suit. *Montgomery* v. *Maryland*, 266 F.3d 334, 337 (4th Cir. 2001). The Fourth Circuit has also held, however, that once a State asserts immunity on appeal based on its attorney's lack of authority to consent to suit, a dismissal on Eleventh Amendment grounds is required. *Id.* at 338-339. Thus, under the Fourth Circuit's approach, a State has an absolute right to engage in risk-free litigation.

[6] Different considerations govern the United States' waiver of immunity from suit. The Appropriations Clause, Article I, Section 9, Clause 7, and the Property Clause, Art. IV, Section 3, Clause 2, allocate to Congress exclusive authority to appropriate money from the treasury and to exercise control over the government's property. *OPM* v. *Richmond*, 496 U.S. 414, 424 (1990) (The Appropriations Clause means that "no money can be paid out of the Treasury unless it has been appropriated by an Act of Congress.") (citations omitted); *Gibson* v. *Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1872) ("Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring [federal] property, or any part of it, and to designate the persons to whom the transfer shall be made.") An Executive branch official therefore may not waive the United States' immunity from suits seeking money or property unless authorized to do so by Congress. *United States* v. *United States Fid. & Guar. Co.*, 309 U.S. 506, 513 (1940) (money); *Stanley* v. *Schwalby*, 162 U.S. 255, 270 (1896) (property). In contrast, the

C. A State Waives Its Forum Immunity By Removing A Case

The remaining question is whether, under the principles discussed above, a State's removal of a case waives its immunity from suit. This is not a circumstance in which Congress has expressly conditioned a State's access to a federal program or benefit on its waiver of immunity from suit. The removal statute gives any litigant, including a State, a right to remove "any civil action" as long as it with falls within the jurisdiction of a federal district court. 28 U.S.C. 1441(a). The text of the removal statute does not in terms condition a State's exercise of that option on its waiver of immunity from suit. The principle that Congress has constitutional authority to condition access to a federal program or benefit on a waiver of immunity is therefore inapplicable.

Nonetheless, a State's removal of a case to federal court is a form of litigation conduct that waives a State's immunity from suit. The removal of a case requires the consent of every defendant. *Chicago, R.I. & Pac. R.R.*, v. *Martin*, 178 U.S. 245, 248 (1900). Accordingly, when a State is sued in state court, the case cannot be removed to federal court unless the State

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text of the Eleventh Amendment does not confine authority to waive immunity to the state's legislative branch. Cf. *Home Tel. & Tel. Co.* v. *City of Los Angeles*, 227 U.S. 278, 286, 290 (1913) ("State" in the Fourteenth Amendment refers to every person or entity "who is the repository of state power," and includes a State's legislative, executive, and judicial authorities.). Moreover, the question whether a statute waives the United States' sovereign immunity is a question of federal law well-suited to federal-court resolution. An inquiry into the authority of state officials to waive sovereign immunity, by contrast, puts the federal court in the awkward position of adjudicating sensitive state law questions.

either affirmatively seeks or voluntarily agrees to its removal. The removal of a case, moreover, unambiguously invokes the jurisdiction of a federal court: It removes the case from the jurisdiction of a state court and places jurisdiction over the case in federal court, unless or until the federal court remands the case to state court. 28 U.S.C. 1446(d) (the filing of a notice of removal in state court "shall effect the removal and the State court shall proceed no further unless and until the case is remanded").

A State that consents to the removal of a case therefore voluntarily and affirmatively invokes the jurisdiction of a federal court. Under cases such as *Clark*, *Gunter*, *Richardson*, and *Gardner*, such a voluntary election to proceed in federal court waives a State's immunity from suit. See pp. 13-16, *supra*,; see also *College Sav.*, 527 U.S. at 675-676 (this Court "will find a waiver" if a State "voluntarily invokes" federal court jurisdiction). Indeed, as in *Clark* and *Gardner*, with respect to the choice of the federal forum, "the State becomes the actor." *Gardner*, 329 U.S. at 574; see also *Clark*, 108 U.S. at 448 (noting the State had become "an actor as well as defendant").

Nor does it matter that the State in this case asserted its immunity from suit on particular claims at the same time that it invoked federal court jurisdiction on other claims. Pet. App. 2a. Once a State invokes the jurisdiction of the federal court, "it may not turn around and say the Eleventh Amendment bars the jurisdiction of the federal court." *Schacht*, 524 U.S. at 393 (Kennedy, J., concurring). The act of removing itself, not removal plus delay, gives rise to the waiver. Nothing in *Clark* or *Gardner* turned on the interval between the act that created the waiver and the assertion of an

Eleventh Amendment issue.[7] This is a situation "in which law usually says a party must accept the consequences of its own acts." *Id.* at 393 (Kennedy, J., concurring). If cases like *Clark* and *Gardner* did not make that clear before, the Court should do so now.

Under the court of appeals' contrary view, a State would have a right to invoke federal court jurisdiction to adjudicate certain claims, while simultaneously insisting that the federal court remand to state court the claims as to which the State has not waived immunity in federal court. Pet. App. 10a-11a, 16a & n.5, 17a. Acceptance of that position would give the State an unprecedented power to force a plaintiff to litigate a single case or controversy in two different forums.

To be sure, in *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 121-123 (1984) (*Pennhurst II*), the Court held that a plaintiff's interest in avoiding the splitting of a single case or controversy is not a sufficient justification for a federal court to exercise jurisdiction over a state law claim against the State without the State's consent. But in that case, the plaintiff could have avoided the splitting of the case or controversy by filing suit in state court. That result protects the plaintiff's interest in avoiding duplicative litigation and fully respects the purpose of the Eleventh Amendment by making States defendants in their own courts on their own terms.

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[7] In cases like *Gunter* and *Richardson*, the timing of the Eleventh Amendment objection has significance because the only voluntary act that may be construed as voluntary invocation of federal court jurisdiction is allowing the case to proceed against the State as a defendant without raising an objection. In *Clark* and *Gardner* and the removal context, an affirmative invocation of a federal forum, rather than a failure to object in a timely manner, gives rise to an inference of waiver.

Here, by contrast, the State seeks a right to *require* litigation in two forums, no matter where the plaintiff files suit. A State may genuinely prefer a federal forum to its own courts for an adjudication of a particular federal claim, Pet. App. 10a-11a, 15a n.4, but nothing in the Eleventh Amendment gives a State a right to require the adjudication of a single case or controversy in two different forums. Indeed, nothing in the text or purposes of the Eleventh Amendment supports affording the States a consequence-free right to prefer a federal forum over their own state courts. Thus, when a State is sued in state court, and there is a basis for removing the case, the State may either choose to have the whole case litigated in state court, or it may choose to have the whole case litigated in federal court. But the Constitution does not give the State a right to insist that the case be broken up and litigated in two forums at once.

Although a State's removal of a case effects a waiver of its immunity from suit in a federal forum, there are significant limits on the scope of that waiver. The Eleventh Amendment incorporates two forms of immunity. A State may choose not to be sued at all, or it may choose to be sued, but only in its own courts. *Pennhurst II*, 465 U.S. at 99. A removal of a case to federal court waives only forum immunity. By voluntarily and affirmatively selecting a federal forum for litigation of a case, the State consents to have a federal court rather than the state court decide the case. The act of removal, however, cannot be understood to waive any defenses that would have been available to the State in state court. The constitutional right not to be sued at all is just such a defense.

That conclusion reflects general Eleventh Amendment principles. The Eleventh Amendment has no

application when the State is a plaintiff, *United States* v. *Peters*, 9 U.S. (5 Cranch), 115, 139 (1809), but it applies with full force when the State is made a defendant through coercive process, *Fiske*, 290 U.S. at 21. The removal statute effectively puts a state defendant in the position of a plaintiff on the issue of forum selection. As this Court put it in *Clark* and *Gardner*, with respect to the forum, the State is the "actor." With respect to all issues other than forum selection, however, a State that removes a case remains an involuntary defendant that has been brought into court through coercive process. The State therefore should not lose any defenses that it would have had in state court.

Thus, to the extent that the Georgia Tort Claims Act waives the State's immunity from suit in state court on petitioner's tort claims, the State's removal of the case gives a federal court jurisdiction to resolve those claims. On the other hand, to the extent that the State would have a sovereign immunity defense to constitutional claims in state court, see *Alden* v. *Maine*, 527 U.S. 706 (1999), its removal of the case to federal court would not waive that defense.[8]

A State's removal of a case also does not waive its right to appeal to a district court's discretion to remand a case to state court. If, for example, a district court dismisses all federal claims in the removed case before trial, and all that remains is a state law claim against

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[8] The question whether a State that removes a case waives its immunity to constitutional claims is largely academic. Section 1983 does not authorize a suit against a State in either state or federal court, *Arizonans for Offical English* v. *Arizona*, 520 U.S. 43, 68-69 (1997); *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989), and a State that removes a case may obtain the dismissal of constitutional claims against it on that basis.

the State, a district court may exercise its discretion to remand the case to state court for trial of that remaining claim. *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 351 (1988); 28 U.S.C. 1367(c), 1447(d). The State may not insist, however, that the Eleventh Amendment requires such a remand.

D. A State's Waiver Of Immunity Is Not Negated By Its Attorney General's Lack Of Express State Law Authority To Consent To Suit

Georgia law does not expressly authorize the State's Attorney General to waive the State's immunity from suit. Pet. App. 6a. Under *Clark*, *Gunter*, *Richardson*, and *Gardner*, however, a State's invocation of federal court jurisdiction waives immunity without regard to whether state law expressly authorizes the State's attorney to consent to suit. At most, those cases require an inquiry into whether the State's Attorney General has authority to litigate on behalf of the State. See p. 15, *supra*. Because Georgia law gives the State's Attorney General authority to litigate on the State's behalf, Pet. App. 6a, the Attorney General's removal of the case waives the State's forum immunity.

The court of appeals based its contrary conclusion on this Court's decision in *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945). Pet. App. 6a. In that case, a plaintiff sued the State to recover taxes paid in protest, and the State litigated the case on the merits, losing in both the district court and court of appeals. This Court granted the State's petition for certiorari based on the State's assertion that the court of appeals had decided an important issue of state tax law in conflict with a decision of the State's Supreme Court. *Id.* at 461-462. In this Court, the State asserted its immunity from suit for the first time, *Id.* at 467, and

the Court ordered the case dismissed on that basis, *id.* at 470.

In *Ford*, as in *Gunter* and *Richardson*, the only basis for finding a wavier was the State's failure to raise a timely Eleventh Amendment objection. Accordingly, the Court first held that the State's assertion of immunity was timely, explaining that "[t]he Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court." 323 U.S. at 467. The Court then noted that the State had conceded that "if it is within the power of the administrative and executive officers of Indiana to waive the state's immunity, they have done so in this proceeding." *Ibid.* Following that observation, the Court stated that "[t]he issue thus becomes one of their power under state law to do so." *Ibid.* Although the Court noted that state law conferred on the State's Attorney General authority to litigate on behalf of the State, it concluded that state law could not "be deemed to confer on that officer power to consent to suit against the state in courts when the state has not consented to be sued." *Id.* at 468.

Ford is difficult to reconcile in principle with the other decisions discussed above that treat a State's litigation conduct in federal court as a waiver, and that consider state law, if at all, solely to determine whether the State's attorney had authority to litigate on its behalf. *Ford* also necessitates an awkward inquiry that goes beyond the state official's representations and turns on sensitive areas of state law. See pp. 17-18, *supra*. Accordingly, on an appropriate occasion, the Court may wish to consider whether *Ford* should be over-

ruled. At the very least, however, *Ford* can and should be limited to cases, like *Ford*, in which a State is brought into federal court through coercive process, and the only basis for finding a waiver is the State's litigation of the merits of a dispute without raising a timely immunity defense. That would reconcile *Ford* with all cases except *Richardson*. In *Clark* and *Gardner*, the State voluntarily became a party in federal court, and in *Gunter*, the State litigated the merits of the dispute all the way through this Court. In subsequent cases, this Court could decide whether to retain *Ford* as a viable precedent, or instead follow the earlier rule of *Richardson*.

Unlike the situation in *Ford* or *Richardson*, the State in this case was not brought into federal court through coercive process. Instead, like the States in *Clark* and *Gardner*, the State in this case affirmatively selected the federal court as its preferred forum. Whatever the continuing vitality of *Ford*, this case is governed by *Clark* and *Gardner*, rather than *Ford*. *Schacht*, 524 U.S. at 395 (Kennedy, J., concurring). The State's invocation of federal court jurisdiction therefore waives the State's forum immunity, and the State may not seek to avoid that conclusion by asserting that its Attorney General did not have express state law authority to consent to suit.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 2001